

BEFORE THE POLLUTION CONTROL HEARINGS BOARD
STATE OF WASHINGTON

CATAPULT HEAVY CONSTRUCTION,)	
)	
Appellant,)	PCHB No. 89-151
)	
v.)	
)	FINAL FINDINGS OF FACT,
NORTHWEST AIR POLLUTION)	CONCLUSIONS OF LAW
AUTHORITY,)	AND ORDER
)	
Respondent.)	

Catapult Heavy Construction appealed the Northwest Air Pollution Authority's ("NWAPA") civil penalty assessment (\$100, \$50 of which suspended) for allegedly violating NWAPA's regulations at Section 550.4 (ash deposition). The Pollution Control Hearings Board ("PCHB") held a hearing on March 20, 1990 in Mt. Vernon, Washington. Chair Judith A. Bendor presided for the Board.

Mike Cheek, owner, represented appellant Catapult. Attorney William H. Nielsen of McIntosh Lewis Evans and Nielsen (Mt. Vernon) represented NWAPA. The proceedings were reported by R. Rebecca Winters of Evergreen Court Reporting.

1 Witnesses were sworn and testified. Argument was made. Board
2 members Wick Dufford has reviewed the record. From the testimony and
3 contentions, the Board makes the following:

4 FINDINGS OF FACT

5 I

6 Mike Cheek owns Catapult Heavy Construction, which is a general
7 contracting business in Skagit County, Washington. The company clears
8 land for development.

9 II

10 The Northwest Air Pollution Authority ("NWAPA") is a municipal
11 corporation with authority to conduct a program of air pollution
12 prevention and control in an area that includes the site where
13 Catapault was clearing land.

14 III

15 On September 12, 1989, NWAPA received from the fire department a
16 citizen complaint about burning in the Wild Reed area. With the
17 Assistant Fire Chief, the inspector visited the Catapult operation,
18 off Waugh Road. He told Mr. Cheek about the complaint. Cheek had a
19 fire department permit for the burning. After discussion, he agreed
20 to move the burn piles to the west, further back from the
21 complainant's property.

22 The inspector left the site and visited the complainant. The
23 inspector discussed the situation with him and his neighbors. The
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1 inspector did not see any particulates on the complainant's property.
2 There was some indication that they had cleaned their lawns and cars.

3 It was acceptable to the neighbors if no more particulates fell
4 on their property.

5 The inspector returned to the burn site, and spoke with Cheek and
6 the Assistant Fire Chief. He explained that there would be liability
7 if particulate matter were to fall on other people's property. While
8 speaking with the owner, he saw ash rising from the piles. No
9 violation was issued.

10 IV

11 Two days later, on November 14, 1989, NWAPA received another
12 complaint. The inspector visited the complainant's home, but he was
13 not there. The inspector did not see a significant amount of
14 particulates.

15 He went to the burn site at about 5 pm, where the land clearing
16 appeared to be largely concluded. One pile, about 20 feet in diameter
17 and 6 feet high, was still burning. He again explained to Cheek the
18 regulation about particulate, noting that Cheek was liable if ash were
19 deposited on peoples' property. He stated that he could not order
20 Cheek to stop burning nor direct him to continue. No violation issued.

21 V

22 On September 15, 1989, NWAPA received complaints from three other
23 residents living in the Thunderbird neighborhood, about three quarters
24 of a mile from the burn site. The inspector visited the complainants'

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1 homes, which lay southeast from the land clearing operation. The wind
2 was blowing from the northwest, the direction of the burn site. There
3 were ash particulates on lawns and back porches. Black film was so
4 thick on one hot tub that the inspector could draw his name in it.
5 Later that day the inspector saw ash falling from the sky in this
6 neighborhood.

7 As a result of the burning, one neighbor's back porch, which had
8 been recently painted, had to be re-painted. The hot tub required
9 cleaning with chemical solvent.

10 The inspector visited the burn site on the 15th, where he saw a
11 smoldering pile.

12 He subsequently had a notice of violation issued to Catapult for
13 the November 15, 1989 burning. Thereafter, Mr. Cheek called and spoke
14 with the inspector, asserting that since he had complied with
15 "mitigation measures" by moving the piles, the violation citation was
16 not fair.

17 VI

18 On October 24, 1989, NWAPA issued Catapult a Notice of Imposition
19 of Penalty, alleging violation of NWAPA Regulation Section 550.4 and
20 assessing a \$100 penalty, with \$50 suspended provided Catapult
21 complied with Section 550 in the future.

22 Catapult filed its appeal with this Board on November 15, 1989,
23 which became our PCHB No. 89-151.

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1 VII

2 We find that Catapult's burning caused the deposition of ash on
3 the lawns and porches, and the particulates on the hot tub.

4 We find that it is unreasonable for neighbors, as a result, to
5 have to re-paint or clean their property with solvents.

6 VIII

7 Any Conclusion of Law which is deemed a Finding of Fact is hereby
8 adopted as such.

9 From these Findings of Fact, the Board makes the following:

10 CONCLUSIONS OF LAW

11 I

12 The Board has jurisdiction over the parties and the subject
13 matter. Chaps. 43.21B and 70.94 RCW.

14 II

15 NWAPA regulations at Section 550.4 states in pertinent part:

16 It shall be unlawful for any person to cause or
17 permit the emission of particulate matter which
18 becomes deposited upon the property of others in
19 sufficient quantities and of such characteristics
with duration [. . .] which unreasonably interferes
with enjoyment of life and property.

20 III

21 We conclude that Catapult burning on September 15, 1989
22 unreasonably interfered with the neighbor's enjoyment of life and
23 property. See, Kaufman Brothers Construction, Inc., v. OAPCA, PCHB
24 Nos. 89-98 and 89-132. Although Catapult took some measures in an

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(5)

1 attempt to prevent the problem, those measures were insufficient.

2 Section 550.4 is a strict liability regulation. We conclude that
3 on November 15, 1989 Catapult violated this regulation. We are not
4 convinced that Mr. Cheek was misled by the NWAPA inspector. We do
5 note that the inspector's statements on September 12 and 14, 1989,
6 were, perhaps, not a model of clarity and additional experience should
7 improve his performance.

8 IV

9 The penalty was imposed pursuant to RCW 70.94.431 and/or Section
10 133 of NWAPA regulations.

11 The principal aim of civil penalties is to deter violations and
12 to secure compliance. The regulatory maximum for this violation is
13 \$250.00. NWAPA regulation at Section 133.1. NWAPA has only assessed
14 \$100, of which \$50 was suspended on condition that there is future
15 compliance with Section 550.

16 We conclude that this small penalty is reasonable and should be
17 affirmed, with a slight modification that the \$50 suspension applies
18 for two years, rather than an open-ended future.

19 V

20 Any Finding of Fact which is deemed a Conclusions of Law is
21 hereby adopted as such.

22 From these Conclusions of Law, the Board reaches the following
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(6)

ORDER

The violation of NWAPA regulations at Section 550.4 is AFFIRMED
The penalty of \$100, of which \$50 is suspended is AFFIRMED, provided
that appellant does not violate Section 550 for two years.

DONE this 21st day of June, 1990.

POLLUTION CONTROL HEARINGS BOARD


JUDITH A. BENDOR, Presiding


WICK DUFFORD, Member

FINAL FINDINGS OF FACT,
CONCLUSIONS OF LAW AND ORDER

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